92-1500

No. 92-_____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

PAUL CASPARI, Superintendent of the Missouri Eastern Correctional Center, and JEREMIAH W. (JAY) NIXON, Attorney General of Missouri,
Petitioners,
v.
CHRISTOPHER BOHLEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

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106 pp

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1992

CHRISTOPHER BOHLEN,	)
	)
Respondent,	)
vs.	)
	)
PAUL CASPARI, AND	)
JEREMIAH W. (JAY) NIXON,	)
	)
Petitioner.	)

INDEX TO PETITIONER'S APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3360EMSL

Christopher Bohlen	•
	•
Appellant,	•
	• Appeal from the
v.	• United States
	• District Court
	• for the Eastern
Paul Caspari, and	• District of
WILLIAM WEBSTER,	• Missouri.
	•
	•
Appellees.	•

After consideration, the court hereby grants Bohlen's motion to amend judgment. Part III of the opinion entitled "CONCLUSION" shall be amended to delete the language "a writ of habeas corpus directing the Missouri circuit court to resentence Bohlen without application of the persistent offender statute" and substitute "a conditional writ of habeas corpus consistent with this opinion. See Cokeley v.

Lockhart, 951 F.2d 916,921 (8th Cir. 1991), cert. denied, 113 S.Ct. 296 (1992)."

December 11, 1992

Order Entered at the Direction of the Court:

--Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth

Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3360

Christopher Bohlen	•
	•
Appellant,	•
	• Appeal from the
v.	• United States
	• District Court
	• for the Eastern
Paul Caspari, and	• District of
WILLIAM WEBSTER,	• Missouri.
	•
Appellees.	•

Submitted: June 9, 1992

Filed: October 16, 1992

Before JOHN R. GIBSON, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

Christopher X. Bohlen appeals the denial of his habeas corpus petition by the district court. Bohlen argues that he was subject to double

jeopardy at a resentencing hearing where the state was given a second chance to prove that he is a persistent offender under Missouri law. Finding that double jeopardy protections apply to persistent offender sentencing proceedings in Missouri, we reverse.

I. BACKGROUND

Bohlen, on July 1, 1982, was convicted by a jury in the Circuit Court of St. Louis County, Missouri, on three counts of first degree robbery. On October 15, 1982, the trial court sentenced him as a persistent offender to three consecutive fifteen-year terms in prison. The record shows that no evidence of prior convictions was presented either at trial or at the sentencing hearing to prove that Bohlen was a persistent offender.

On direct appeal, the Missouri Court of Appeals affirmed the conviction, but reversed and remanded for a hearing on the state's allegations of prior convictions and for resentencing if the state could prove Bohlen's persistent

offender status beyond a reasonable doubt. State v. Bohlen, 670 S.W.2d 119, 123 (Mo. Ct. App. 1984). At the resentencing hearing, the state introduced evidence of four prior felony convictions. The trial court determined that Bohlen was a persistent offender, and again sentenced him to three consecutive fifteen-year terms. On direct appeal of the second sentence, the Missouri Court of Appeals affirmed, holding that the question of double jeopardy was not involved because double jeopardy protections do not apply to sentencing. State v. Bohlen, 698 S.W.2d 577, 578 (Mo. Ct. App. 1985).

On September 5, 1989, Bohlen filed the present petition for a writ of habeas corpus under 28 U.S.C. § 2254. Bohlen's petition alleged, among other things, that he was subjected to double jeopardy when the state was allowed to introduce evidence of prior convictions at the second sentencing hearing. The magistrate judge recommended that relief be denied. Bohlen v. Caspari, No. 89-1651-C (4), Report and Recommendation of the Magistrate Judge (E.D. Mo. August 14, 1991). According to the magistrate judge, jeopardy did not

attach at the first sentencing hearing because the hearing lacked the hallmarks of an adversarial trial. Id. at 13. Thus, the second sentencing hearing did not violate double jeopardy. The district court adopted the magistrate judge's recommendations and denied habeas corpus relief. Bohlen v. Caspari, No. 89-1651-C (4), Order (E.D. Mo. August 28, 1991). Bohlen appeals arguing that the resentencing hearing constituted double jeopardy under the rule announced in Bullington v. Missouri, 451 U.S. 430 (1981).

II. DISCUSSION

The issue in this case is whether the double jeopardy clause of the Fifth Amendment, imposed upon the state through the Fourteenth Amendment, prevents resentencing of a defendant in a non-capital case where an appellate court has reversed the defendant's sentence, under a persistent offender statute, for the state's failure to prove any prior convictions. Since Bohlen is before us on collateral review, we must determine as a threshold matter whether applying the double jeopardy rule in Bullington to a non-capital case would

constitute a "new rule" for purposes of retroactivity.[1] Penry v. Lynaugh, 492 U.S. 302, 313 (1989); Teague v. Lane, 489 U.S. 288, 300-01 (1989); Newlon v. Armontrout, 885 F.2d 1328, 1331 (8th Cir. 1989), cert. denied, 110 S.Ct. 3301 (1990). Under Teague Bohlen may not attack his sentence on federal habeas corpus using a rule of constitutional law established after his sentence became final unless the rule falls into one of two narrow exceptions.[2] Saffle v. Parks, 494 U.S. 484, 494-95

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[1]We have addressed this issue before and found that double jeopardy protection does apply in certain non-capital sentencing proceedings, Nelson v. Lockhart, 828 F.2d 446, 449 (8th Cir. 1987), reversed on other grounds sub nom. Lockhart v. Nelson, 488 U.S. 33, 37-38 n.6 (1988). However, Nelson v. Lockhart was decided after Bohlen's sentence became final and thus is not applicable under Teague if it is a new rule. Accordingly, we discuss whether Bullington applies in non-capital caes from the perspective of a state court sitting at the time Bohlen's conviction became final, without the benefit of Nelson v. Lockhart.

[2]Teague and its progeny speak in terms of the date of conviction instead of the date of sentencing. Since Bohlen does not attack the constitutionality of his underlying conviction, however, the relevant date for purposes of our inquiry is the date his sentence became final. See Stringer v. Black, 112 S.Ct. 1130, 1136 (1992).

(1990); Teague, 489 U.S. at 311-13. Since we find that extending double jeopardy protection to the Missouri persistent offender sentencing procedure is not a new rule for retroactivity purposes, we do not address the application of the two exceptions here.

A. New Rule Analysis

The Supreme Court has defined a new rule as one which "breaks new ground or imposes a new obligation on the States or the Federal Government," or, "[t]o put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's [sentence] became final." Teague, 489 U.S. at 301. The Court noted that "[i]t is admittedly often difficult to determine when a case announces a new rule." Id. Difficulties inevitably arise in attempting to distinguish application of a new rule from application of a well-established constitutional principle to a case which is analogous to those considered in prior case law. Penry, 492 U.S. at 314. A rule is not new if "a state court considering [petitioner's] claim at the time his [sentence]

became final would have felt compelled by existing precedent to conclude that the rule [petitioner] seeks was required by the Constitution." Saffle, 494 U.S. at 488.

Bohlen's sentence became final on August 20, 1985, when the Missouri Court of Appeals affirmed his sentence after remand. State v. Bohlen, 698 S.W.2d 577 (Mo. Ct. App. 1985). Since Burks v. United States, 437 U.S. 1 (1978) and Bullington v. Missouri, 451 U.S. 430 (1981), were decided before his sentence became final, Bohlen is entitled to the benefit of those decisions under the retroactivity principles announced in Griffith v. Kentucky, 479 U.S. 314 (1987).

In Burks, the Supreme Court held that the double jeopardy clause forbids retrial of a defendant whose conviction is overturned by an appellate court because of insufficiency of the evidence at trial. Burks, 437 U.S. at 16. According to the Court, the reversal for insufficient evidence is tantamount to an implicit acquittal by the trial court. Id. at 18. In Bullington, the Court extended this principle to a death penalty sentence enhancement hearing. Bullington, 451 U.S. at 442-443. The

defendant in Bullington was convicted of capital murder and sentenced by the jury after an enhancement hearing to life in prison rather than death, the other alternative under the Missouri statute. After the verdict and sentence, Bullington successfully moved for a new trial. The state then gave notice that it intended to seek the death penalty for a second time. Bullington claimed that the double jeopardy clause barred the imposition of the death penalty because the first jury had declined to impose a death sentence. The Missouri Supreme Court found no double jeopardy implications. The United States Supreme Court reversed.

The Court reasoned that although "[t]he imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed," Bullington, 451 U.S. at 438, "[b]y enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, . . . Missouri explicitly requires the jury to determine whether the prosecution has 'proved its case.'" Id. at 444. Under these circumstances, because the jury had failed to find

"whatever was necessary" to sentence Bullington to death, imposition of the life sentence acted as an implicit acquittal of the death penalty. Thus, the double jeopardy clause protected Bullington from being subjected to a new hearing where the death penalty might be imposed.

The Court found it significant in deciding to invoke the double jeopardy protection that, unlike usual sentencing procedures in which the "sentencer's discretion [is] essentially unfettered," id. at 439, the Missouri capital sentencing procedure required a separate hearing where the jury was presented with a choice between two alternatives and standards to guide them in making that choice. Id. at 438. The prosecution was not allowed to simply recommend appropriate punishment, but "undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts."[3]

[3]The Court found that use of the reasonable doubt standard indicated that it was the state, not the defendant, that should bear almost the entire risk of error. Bullington, 451 U.S. at 446.

Id. The Court held that these statutory protections made the Missouri capital sentencing proceed ing unlike ordinary sentencing proceedings to which the double jeopardy clause does not apply. See North Carolina v. Pearce, 395 U.S. 711, 720 (1969).[4] The capital sentencing proceeding in Bullington was so similar to a trial on the issue of guilt that Bullington was entitled to double jeopardy protection. Thus, the Court applied the rule announced in Burks--that a defendant may not be retried if he obtains a reversal of his conviction for insufficiency of the evidence--to Bullington.

The persistent offender sentencing enhancement

[4]The state argues that "the continuing vitality of Bullington is open to question since it has no foundation in the rationales discussed in North Carolina v. Pearce." Appellee's Brief at 11. This argument appears to put the cart before the horse since Bullington was decided after Pearce and carved out a specific exception to the rationale of Pearce. Bullington distinguished Pearce because, among other reasons, "there was no separate sentencing proceeding at which the prosecution was required to prove--beyond a reasonable doubt or otherwise--additional facts in order to justify the particular sentence." Bullington, 451 U.S. at 429.

procedure in Missouri has protections similar to those in the capital sentencing hearing in Bullington. A persistent offender is a person who has pleaded guilty to or has been found guilty of two or more felonies committed at different times. Mo. Rev. Stat. § 558.016.3 (1986). In order for the court to find that a defendant is a persistent offender, (1) the charging document must plead all essential facts warranting a finding that the defendant is a persistent offender; (2) evidence must be introduced by the state to establish that the facts as pleaded warrant a finding beyond a reasonable doubt that the defendant is a persistent offender; and (3) the trial court must make findings of fact that warrant a finding beyond a reasonable doubt that the defendant is a persistent offender. Id. § 558.021.1. At the hearing on persistent offender status, the defendant has rights of confrontation, cross-examination, and the opportunity to present evidence. Id. §558.021.4. Persistent offender status greatly affects the defender's rights. A finding by the court that the defendant is a persistent offender deprives the defendant of the opportunity to be

sentenced by a jury, id. §§ 557.036.2; 558.016.1, and subjects the defendant to the possibility of a greater term of imprisonment. Id. § 558.016.1.

The state argues that Bullington does not extend to non-capital cases. According to the state's argument, application of double jeopardy protection to capital sentencing was compelled because capital sentencing involves "additional sensitivities created by the Eighth Amendment" not present in persistent offender enhancement hearings. Appellee's Brief at 11. The language of Bullington belies this assertion. Nowhere in Bullington does the majority rely on Eighth Amendment concerns to support its holding. In his dissent, Justice Powell explicitly recognizes the scope of the majority rule, noting that "[t]he Court does not purport to justify its conclusion with the argument that facing the death sentence a second time is more of an ordeal in the legal sense than facing any other sentence a second time." Bullington, 451 U.S. at 451 (Powell, J., dissenting). According to its plain language, Bullington is applicable to any sentencing procedure that is sufficiently

similar to a trial of guilt or innocence to implicate the double jeopardy clause.

Accordingly, we find that Bullington dictates that the implicit acquittal rationale of Burks must apply to the Missouri persistent offender sentencing scheme to bar a second enhancement hearing where there has been a finding of insufficient evidence of persistent offender status.[5] Missouri

[5]The district court adopted the magistrate's reasoning that in this instance jeopardy did not attach in the first hearing because there were no disputed issues, no new evidence or witnesses were presented (other than allocution), there were no opening or closing statments made by either party, and the reasonable doubt standard was not employed. Bohlen v. Caspari, No. 89-1651-C (4), Report and Recommendation of the Magistrate Judge at 13 (E.D. Mo. August 14, 1991). The magistrate judge noted that "[i]n fact, the prosecutor remained silent throughout most of the proceeding." Id. This reasoning does not follow from double jeopardy jurisprudence. If the state were to proceed to trial in a criminal case, and after the jury was sworn presented no evidence or witnesses, further prosecution would be prohibited." Crist v. Bretz, 437 U.S. 28, 35 (1978); State v. Fitzpatrick, 676 S.W.2d 831, 834 (Mo. 1984) (en banc). Missouri's statutory requirements for persistent offender hearings are clear. The state cannot defeat a double jeopardy claim by showing that it totally failed to sustain its

considers persistent offender sentencing serious enough to set up a statutory enhancement procedure with protections similar to a trial on guilt or innocence. That procedure is sufficiently similar to trial procedures that it triggers double jeopardy protection. In a persistent offender hearing, the trial court has two alternatives: to find that the defendant is a persistent offender beyond a reasonable doubt or not. The outcome of this decision greatly affects the possible length of defendant's sentence. By placing the burden of proof beyond a reasonable doubt on the state, Missouri has indicated that the state should bear most of the risk of error. It is a hallmark of our system of jurisprudence that "the State with all its resources and power should not be al lowed to make repeated attempts to convict an individual for an alleged offense." Green v. United States, 355 U.S. 184, 187 (1957). After Bullington, it is a short step to apply the same double jeopardy protection to a non-capital sentencing hearing as the Supreme Court applied to a capital

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burden of proof.

sentence enhancement hearing. The rule is not new. Accordingly, Teague does not bar Bohlen from reliance on the double jeopardy principles announced in Bullington.

B. Reasonableness Determination

The state argues that even if we find Bullington controlling, we should give deference to the Missouri Court of Appeals' rejection of the Bullington rule in a non-capital case because it was reasonable under the jurisprudence at the time Bohlen's sentence became final. In support of this argument the state asserts that there is currently a split among the federal circuits on the issue of whether Bullington applies in non-capital cases and that Missouri courts have held that the persistent offender statute does not implicate double jeopardy.[6]

The principles of Teague serve to ensure that "gradual

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[6]The state also distinguishes the present case from Bullington because the persistent offender decision here was made by the judge, not a jury. This distinction does not affect the determination of whether Bullington applies in non-capital cases. See Stringer, 112 S.Ct. at 1138-39; Fong Foo v. United States, 369 U.S. 141, 143 (1962).

developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." Sawyer v. Smith, 497 U.S. 227, 234 (1990). The Supreme Court extended this principle recently, holding that "a federal habeas court 'must defer to the state court's decision rejecting the claim [under its interpretation of existing law] unless that decision is patently unreasonable.'" Wright v. West, 112 S.Ct. 2482, 2490 (1992) (quoting Butler v. McKellar, 494 U.S. 407, 422 (1990) (Brennan, J., dissenting)). Reasonableness in this context is an objective standard. Stringer v. Black, 112 S.Ct. 1130, 1140 (1992). Thus, the ultimate decision whether precedent at the time Bohlen's sentence became final dictated application of the double jeopardy clause to the Missouri persistent offender hearing is based on our objective reading of Bullington.

In this case, as indicated, the state argues that there is a split among the circuits which shows that reasonable jurists could disagree over whether Bullington applies in non-capital cases. Thus, the state argues, the Missouri appellate court

acted reasonably when it denied Bohlen double jeopardy protection. The state notes additionally that the Supreme Court has not yet commented on the availability of Bullington in non-capital proceedings. See Lockhart v. Nelson, 488 U.S. 33, 37-38 n.6 (1988) (declining to address the issue because the Eighth Circuit held that Bullington does apply in non-capital cases and the state conceded the issue in its brief and at oral argument); Hunt v. New York, 112 S.Ct. 432 (1991) (White, J., dissenting from denial of certiorari).

We note initially that the apparent split among the circuits may in fact be illusory. In Lockhart v. Nelson, the Court, assuming that Bullington applies to non-capital cases, held that double jeopardy does not apply to enhancement proceedings where the sentence is reversed due to trial error, not insufficient evidence. Lockhart v. Nelson, 488 U.S. at 39. In both federal cases relied on by the state as barring double jeopardy protection in sentencing enhancement proceedings, the holdings were ultimately based on trial error. See Linam v. Griffin, 685 F.2d 369, 374 (10th Cir. 1982) (double jeopardy

does not bar resentencing when evidence is incorrectly excluded), cert. denied, 459 U.S. 1211 (1983); Denton v. Duckworth, 873 F.2d 144, 148 (7th Cir.) (under Lockhart v. Nelson, double jeopardy does not apply where evidence initially introduced was sufficient, even if some of it was introduced erroneously), cert. denied, 493 U.S. 941 (1989). See also Tate v. Armontrout, 914 F.2d 1022, 1026 (8th Cir. 1990) (distinguishing a total failure of proof from situations where sufficient evidence was produced, but erroneously excluded). Appellant cites no federal holding resting squarely on the proposition that Bullington does not apply to non-capital sentencing enhancement proceedings.

The state's argument that we should defer to the Missouri appellate court because it followed prior Missouri precedent similarly lacks foundation. On direct appeal after resentencing, the appellate court relied on State v. Holt, 660 S.W.2d 735, 739 (Mo. Ct. App. 1983) and State v. Lee, 660 S.W.2d 394, 399 (Mo. Ct. App. 1983) (per curiam), for the proposition that double jeopardy is not implicated when the

court remands for determination of persistent offender status and resentencing. See State v. Bohlen, 698 S.W.2d 577, 578 (Mo. Ct. App. 1985). Holt does not discuss Bullington at all. In Lee, after asserting a split in the circuits, the Missouri Court of Appeals stated that "[i]n all events, this court is constrained to follow the procedure on this issue clearly mandated by the decisions of the Supreme Court of Missouri first cited above." Lee, 660 S.W.2d at 400. All of the Missouri Supreme Court decisions cited by the court were decided before Bullington. See id. at 399. Lee rejected without comment the distinction made in State v. Cullen, 646 S.W.2d 850 (Mo. Ct. App. 1982), between insufficient evidence of persistent offender status and failure of proof due to trial error. See Lee, 660 S.W.2d at 400.

The views of the other federal circuits and of the Missouri courts are relevant to our inquiry into whether the Missouri Court of Appeals decision was a reasonable interpretation of existing precedent, but they are not dispositive. Stringer, 112 S. Ct. at 1140. In Stringer, the Supreme Court found that an objective reading of the relevant precedent

dictated a rule that had been previously rejected by the Fifth Circuit. In answer to the state's argument that the Fifth Circuit decision indicated that reasonable jurists could disagree, the Court responded: "[t]he short answer to the State's argument is that the Fifth Circuit made a serious mistake." Id. As we discussed supra, Bullington dictates that double jeopardy protections are available in sentencing proceedings that bear the hallmarks of a trial on guilt or innocence. To the extent that any of the other federal circuits or the Missouri courts have held to the contrary, we think that they were mistaken. Extending Bullington to non-capital sentencing enhancement hearings is not a sufficient stretch to cause it to be a new rule under Teague. Accordingly, we hold that the Missouri Court of Appeals' decision denying Bohlen double jeopardy protection on remand was unreasonable under the precedent existing at the time Bohlen's sentence became final. We emphasize that in this is not a case of trial error, but a total failure of proof.[7]

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[7]The state suggested at oral argument that evidence of prior convictions might have been

"Having received 'one fair opportunity to offer whatever proof it could assemble,' Burks v. United States, 437 U.S. at 16, the State is not entitled to another." Bullington, 451 U.S. at 446.

III. CONCLUSION

For the reasons discussed above, the decision of the district court is reversed and the case shall be remanded with directions for the district court to enter a writ of habeas corpus directing the Missouri circuit court to resentence Bohlen without application of the persistent offender statute.

A true copy.

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offered at the first hearing, but was erroneously omitted from the record. Our review of the transcripts belies this assertion. In any event, the state was given ample opportunity to complete the record on Bohlen's direct appeal:

> Our search of the record indicates that although the defendant was sentenced by the judge as a persistent offender no proof was made of the prior convictions. We requested the parties to supplement the record to prove that the prior convictions were presented to the court. No such proof was furnished.

State v. Bohlen, 670 S.W.2d 119, 123 (Mo. Ct. App. 1984).

Attest:

CLERK, U. S. COURT OF APPEALS,

EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHRISTOPHER X. BOHLEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 89-1651C(4)
	)	
PAUL CASPARI, et al.,	)	
	)	
Respondents.	)	

ORDER

The Court has carefully considered petitioner's request for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, the Report and Recommendation of the United States Magistrate concerning said request, and petitioner's objections and incorporated suggestions. Wherefore,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate be and it is sustained and adopted as the order of this Court.

IT IS FURTHER ORDERED that petitioner's request for a writ of habeas corpus is denied for the reasons set forth in that report and recommendation.

Dated this --28th-- day of August, 1991.

–Clyde S. Cahill --

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHRISTOPHER X. BOHLEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 89-1651C(4)
	)	
PAUL CASPARI, et al.,	)	
	)	
Respondents.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the Court on the petition of Missouri state prisoner Christopher X. Bohlen for a writ of habeas corpus under 28 U.S.C. §2254. This matter was referred to the undersigned United States Magistrate Judge for review and a recommended disposition. 28 U.S.C. §636(b).

On July 1, 1982, petitioner Christopher X. Bohlen was convicted of three counts of first degree robbery in the Circuit Court of St. Louis County. He

was sentenced on October 15, 1982 as a persistent offender to three consecu tive 15-year terms of imprisonment. Petitioner is presently incarcerated at the Missouri Eastern Correctional Center located in Pacific, Missouri.

Petitioner's convictions and sentences were affirmed on direct appeal. State of Missouri v. Bohlen, 670 S.W.2d 119 (Mo. App. 1984); State of Missouri v. Bohlen, 698 S.W.2d 577 (Mo. App. 1985). He subsequently sought collateral post-conviction relief under Missouri Supreme Court Rule 27.26. (Resp. Exh. K, L.) The motion court's denial of relief was upheld on appeal. Bohlen v. State of Missouri, 743 S.W.2d 425 (Mo. App. 1987).

On September 5, 1989, petitioner filed the instant petition for a writ of habeas corpus alleging 11 grounds for relief. The undersigned reviewed the writ and recommended it be dismissed without prejudice because peti tioner presented a "mixed

petition" containing both exhausted and unexhausted grounds. (Report and Recommendation filed December 18, 1990.) The Court must dismiss the entire petition when the habeas petitioner fails to exhaust all grounds and adequate state remedies remain available unless the petitioner voluntarily deletes the unexhausted grounds from his petition. Rose v. Lundy, 455 U.S. 509, 522 (1982).

On January 9, 1991, petitioner voluntarily deleted his unexhausted habeas grounds 1, 5, 7, 9, 10 and the due process portion of ground 11 and sought relief in federal court for his fully exhausted habeas grounds. The remaining grounds for habeas relief alleged by petitioner are six: (a) he was deprived of due process and a fair trial because the prosecutor improperly referred to matters outside the record during closing argument (original ground 2); (b) he was deprived of due process and a fair trial because the trial judge failed to declare a mistrial

after the prosecutor improperly argued facts not in evidence during closing argument (original ground 3); (c) he was denied his right to confront and cross-examine witnesses against him (original ground 4); (d) he was subjected to double jeopardy when the state was allowed to adduce additional evidence at a second enhancement proceeding (original ground 6); (e) his trial counsel was ineffective for failing to investigate and assert an alibi defense (original ground 8); and (f) his trial counsel was ineffective for failing to object to the prosecutor's demonstration at trial (original ground 11).

Petitioner's grounds (a) and (b) for relief allege the prosecutor's improper remarks during closing argument and the trial judge's failure to declare a mistrial after such remarks violated his right to a fair trial and due process guaranteed by the Fifth and Fourteenth Amendments.

At trial the prosecution sought to prove that

Bohlen, with others, robbed the Blust Jewelry Store in Overland, Missouri. Most of the state's evidence came from four eyewitnesses (Winbermuehle, Le Roy, Robertson and Long) who observed the robbery for periods ranging from a few seconds to a minute. Two eyewitnesses (Robertson and Long) positively identified petitioner as one of the robbers. The others (Winbermuehle and Le Roy) could not. The state also produced a jewelry tag, a lighter, and a ski mask, all of which were allegedly associated with the robbery (State Exhs. 1, 3, 5).

The defense called three eyewitnesses (O'Dell, Dempsey and Taxman) who were unable to identify petitioner as a participant in the crime, though none of the witnesses could testify he was not one of the participants.

The evidentiary portion of the trial lasted three days and on the final day during closing argument for the state, the prosecuting attorney improperly

argued the law and the court sustained defense counsel's objection. (Tr. 325-26). The prosecutor pursued a new course and argued he did not have possession of a film[1] depicting the robbery and even if he had, it would not be revealing. (Tr. 326.) Defense counsel again successfully objected. Finally, the prosecutor blurted, "There is no film."

Defense counsel objected to the prosecutor's statements concerning the film and the court ordered a side bar conference. (Tr. 326.) In proceedings outside the hearing of the jury, defense counsel requested a mistrial and the trial judge responded, "I'll grant it." (Tr. 327.) In an attempt to preserve the

[1]The prosecutor was referring to a film retrieved from a surveillance camera inside the jewelry store. (Tr. 124.) Mr. Winbermuehle gave the film, which depicted the robbery, to officers from the Overland Police Department. (Tr. 125.) The witnesses later viewed the film, but it was not helpful for identification purposes. (Tr. 135.) Some time prior to trial the film was destroyed and was never prodcued as evidence. (Tr. 326.)

proceedings the prosecutor explained his interpretation of the objections and suggested the court admonish him and strike his offending statements from the record. (Tr. 327-28.) The trial judge did not grant a mistrial, but instructed the jury to disregard the prosecutor's last comment. (Tr. 328.)

The adversary system permits and encourages prosecutors to "prosecute with earnestness and vigor". United States v. Young, 470 U.S. 1, 7 (1985) (quoting, Berger v. United States, 295 U.S. 78, at 88 (1935)). Courts recognize that in the heat of argument a prosecutor may occasionally make remarks prejudicial to the accused which are not supported by evidence. Id., at 10.

When a federal court in a habeas proceeding reviews allegations of improper comments made by a prosecutor, the standard of review is very narrow. Darden v. Wainwright, 477 U.S. 168, 181 (1985). All

relevant factors must be considered before a conviction may be overturned. Young, supra, 470 U.S. at 11. It is not enough to overturn a conviction that the prosecutor makes undesirable or unacceptable remarks. Darden, supra, 477 U.S. at 181. The relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id., (quoting, Donnelly v. DeChristoforo, 416 U.S. 637, at 643 (1974)).

When an error occurs a trial judge can take corrective measures to remedy the proceedings. Prompt action by the presiding judge in the form of corrective instructions to the jury or an admonishment of the offending attorney may be sufficient to correct an errant prosecutor's remarks. Young, supra, 470 U.S. at 13.

In the present case the prosecutor's remarks and the judge's denial of defendant's motion for a

mistrial are not of a constitutional magnitude which require reversal. It is not disputed that the prosecuting attorney's remarks constituted error, but those remarks did not so infect the trial with unfairness that due process was lacking. The remarks were isolated.

The judge initially indicated his desire to grant a mistrial due to the erroneous remarks, but on reflection chose another, less drastic remedy. The judge ordered the jury to disregard the prosecutor's last statement. (Tr. 328.) This prompt action was sufficient to correct any prejudice resulting from the prosecutor's closing argument and afforded defendant a fair trial. Petitioner's federal habeas grounds (a) and (b) should be denied.

Petitioner's ground (c) alleges his right to confront and cross-examine a witness against him was denied. In the indictment, the state charged petitioner with three counts of first degree robbery.

The third count was for stealing a wristwatch owned by Minerva Pastor. (Indictment, Exh. B.) The state never called Ms. Pastor to testify, but sought to prove the crime through the testimony of Steve Winbermuehle, the jewelry store manager. Mr. Winbermuehle testified that a gunman ordered the employees to remove their wristwatches. (Tr. 105.) Mr. Winbermuehle removed his and then helped Ms. Pastor do the same. (Tr. 105). This testimony was the only evidence the state presented to prove the third count of first degree robbery.

The Confrontation Clause of the Sixth Amendment is made applicable to the states by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965). The Confrontation Clause allows a defendant the opportunity to cross-examine hostile witnesses to assess the truthfulness of their testimony. Ohio v. Roberts, 448 U.S. 56, 63-64 (1980). It is not affected when the government fails

to call a potential witness. United States v. Polisi, 416 F.2d 573, 579 (2nd Cir. 1969). A state, in a criminal proceeding, is not required to call each and every witness who may be able to provide testimony, State of Missouri v. Smith, 632 S.W.2d 3, 5 (Mo. App. 1982), but it may make strategic decisions and select those witnesses who will enhance the prosecution's case.

Steve Winbermuehle testified that a gunman took Ms. Pastor's wristwatch. Defense counsel had an opportunity to and did cross-examine Mr. Winbermuehle to attack his credibility and truthfulness. Since Ms. Pastor did not testify, petitioner's right to cross-examine her was not violated. Petitioner's ground (c) should be denied.

Petitioner's ground (d) alleges he was subject to double jeopardy when the state was allowed to adduce additional evidence at a second sentencing proceeding.

On October 15, 1982, petitioner appeared before Circuit Judge Milton Saitz to be sentenced for the three convictions of first degree robbery. (Exh. A, p. 336). At the sentencing hearing petitioner's attorney supplemented his motion for a new trial. (Exh. A, pp. 336-337.) He then spoke before Judge Saitz on behalf of his client to present potentially mitigating circumstances relevant to sentencing. (Exh. A, p. 339.) Petitioner likewise spoke in an attempt to mitigate his sentence. (Exh. A, pp. 339-340). The prosecution declined to comment or present new evidence. (Exh. A, p. 340.) Judge Saitz, having heard all the testimony, declared petitioner a persistent offender and sentenced him to an enhanced sentence of three consecutive 15-year prison terms. (Exh. A, p. 341).

For a judge to classify an individual as a persistent offender, the state must prove beyond a reasonable doubt that the defendant "pleaded guilty

or has been found guilty of two or more felonies committed at different times." §558.016(3) R.S.Mo.

Petitioner appealed the enhanced sentence on the ground that the state presented insufficient evidence to classify him as a persistent offender. The Missouri Court of Appeals could not find any evidence in the record to show that the state had proven petitioner was a persistent offender. Bohlen, supra, 670 S.W.2d at 123. The court ordered the parties to supplement the record to show that the trial court had received evidence of prior convictions at the time of the initial sentencing hearing. Id. Because there was no record the state had produced such evidence, the Court of Appeals remanded the case for a second sentencing hearing to determine whether petitioner deserved persistent offender status. Id.

During the resentencing hearing, the prosecution presented evidence that petitioner had

committed four previous felonies. (Exh. F, pp. 2-3). Petitioner's attorney advanced several arguments to contradict the state's evidence. (Exh. F, pp. 3-12.) He strongly objected to the introduction into evidence of four prior convictions. (Exh. F, p. 7.) After the presentation of evidence, Judge Saitz adjudged petitioner a persistent offender. (Exh. F, p. 10.) Thereafter, both petitioner and his attorney spoke one final time on his behalf. (Exh. F, pp. 14-15.) At the close of allocution Judge Saitz reinstated the three 15-year consecutive sentences. (Exh. F, pp. 15-16.) The Missouri Court of Appeals affirmed the sentence and held that the double jeopardy prohibition does not apply to sentencing hearings. Bohlen, supra, 698 S.W.2d at 578. Petitioner filed the instant petition for a federal writ of habeas corpus and contests this holding. Upon review, the undersigned believes that the Double Jeopardy Clause was not violated by petitioner's second

sentencing hearing.

The Double Jeopardy Clause of the Fifth Amendment is enforceable against the states through the Fourteenth Amendment. Benton v. State of Maryland, 395 U.S. 784, 787 (1969). Double jeop ardy prohibits a second trial for the same offense after an earlier disposition. Bullington v. Missouri, 451 U.S. 430, 437 (1981). The Double Jeopardy Clause prevents a state from subjecting an individual to "embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." Green v. United States, 355 U.S. 184, 187-188 (1957). It also prevents the prosecution from "honing its trial strategies and perfecting its evidence through successive attempts at conviction." Tibbs v. Florida, 457 U.S. 31, 41 (1982).

The Supreme Court recently has held that a defendant is protected from double jeopardy in a jury-tried, death penalty, sentence enhancement

proceeding. Bullington, supra, 451 U.S. at 446. In Bullington, a jury convicted defendant of first degree murder. Id., at 432. Under Missouri law, once a defendant is convicted of first degree murder, the issue of punishment is presented to the convicting jury in a bifurcated hearing. §565.006(2), R.S.Mo. (1978). At the hearing the prosecution must prove beyond a reasonable doubt at least one statutorily aggravating circumstance. §565.012(5) R.S.Mo. (1978). After both sides present evidence a jury can select two possible punishments: (1) life imprisonment without parole for at least 50 years; or (2) death. §565.008.1 R.S.Mo. (1978).

At the separate sentencing hearing in Bullington the prosecution presented new evidence of defendant's aggravating circumstances. Bullington, supra, 451 U.S. at 435. Defense counsel did not produce any evidence. Id. After deliberation the jury sentenced defendant to life imprisonment

rather than death. Id., at 435-36. Bullington sucessfully moved for a new trial. Id., at 436. Shortly thereafter the prosecution filed a notice that it intended to seek the death penalty again at the new trial. Id. Petitioner appealed this notice and the Supreme Court held that subjecting him to a possible death sentence after a jury sentenced him to life imprisonment placed him in double jeopardy. Id., at 446.

The Supreme Court reasoned that Missouri's bifurcated capital sentencing hearing so closely resembled a criminal trial that the protection from double jeopardy, which is available at trial, should be available at the separate sentencing hearing. Id. At the sentencing hearing the jury did not sentence Bullington to death, but explicitly selected the lesser sentence of life imprisonment. Id., at 438. This finding was an implicit acquittal of the death penalty. Id., at 445.

The Missouri capital sentencing proceeding has other similarities to a criminal trial: (1) both parties have an opportunity to make opening and closing arguments; (2) both parties may present new evidence subject to the rules of evidence; and (3) a defendant has the right to confront and cross-examine witnesses against him. Id., at 434, 446; §565.006(2) R.S.Mo. (1978).

The Eighth Circuit applied the double jeopardy standard in a case involving non-capital, jury-tried enhancement proceedings. Nelson v. Lockhart, 828 F.2d 446, 449 (8th Cir. 1987), rev'd on other grounds, Lockhart v. Nelson, 488 U.S. 33 (1988). In Nelson the defendant agreed to be sentenced by a jury pursuant to Arkansas' habitual criminal offender act. Id., at 447. The Arkansas habitual offender statute allows a state to give a defendant an enhanced sentence, if a jury finds beyond a reasonable doubt that defendant committed four prior

felonies. Ark. Stat. Ann. §41-1005 (1977). After the prosecution offered evidence of four prior felony convictions at a separate sentencing hearing the jury found defendant to be a habitual offender and sentenced him to 20 years. Id. Unknown to anyone at the time, the defendant had been pardoned of one of the prior offenses. Id., at 448. The petitioner filed a writ of habeas corpus claiming the state produced insufficient evidence to convict him as a persistent offender, because it introduced evidence of a conviction which had been pardoned. The Eighth Circuit agreed and held that the Double Jeopardy Clause applied to enhanced jury-tried sentencing proceedings which are sufficiently similar to a trial on the merits and the second sentencing hearing subjected him to double jeopardy. Id. The Supreme Court reversed and allowed retrial on the ground that admitting the pardoned conviction was a mere trial

error. Lockhart v. Nelson, supra, 488 U.S. at 40.[2]

The Supreme Court did not believe it needed to directly confront the issue whether double jeopardy attached to non-capital, jury-tried, enhanced sentencing proceedings, so it merely assumed it applied. Id., at 37-38 n.6.

The high Court has historically held that double jeopardy attaches to an acquittal, even though "the acquittal was based upon an egregiously

[2]Other courts have had opportunities to decide whether double jeopardy applies to sentencings. The Seventh Circuit held that Double Jeopardy does not apply to Indiana's habitual offender statute. Denton v. Duckworth, 873 F.2d 144 (7th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 341 (1989). Compare Benigni v. Hemet, 882 F.2d 356 (9th Cir. 1989) and Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982), which hold that double jeopardy prohibits the sentencing of the defendant as a habitual offender at a second trial. The Second and Tenth Circuits have not directly ruled whether double jeopardy applies to enhanced sentencing proceedings but have assumed it may. Linam v. Griffin, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211 (1983); Sailor v. Scully, 836 F.2d 118 (2nd Cir. 1987), cert. denied, 486 U.S. 1025 (1988).

erroneous foundation" United States v. DiFrancesco, 449 U.S. 117, 129 (1980), quoting in part, Fong Foo v. United States, 369 U.S. 141, 143 (1962). However, the Court has been reluctant to give these same constitutional protections to sentencing proceedings. Id., at 132. It has stated that there are such fundamental differences between an acquittal and a sentencing hearing that they deserve separate treatment. Id., at 133. "[A] sentence is characteristically determined in large part on the basis of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature." Id., at 136-137.

In the present case, the initial sentencing hearing did not have the hallmarks of an adversary trial on guilt or innocence. There were no disputed issues. No new witnesses or new evidence was

presented. Other than allocution, there were no opening or closing statements made by either party. In fact, the prosecutor remained silent throughout most of the proceeding. This created, for all practical purposes, a non-adversarial proceeding. The "beyond a reasonable doubt" standard was not employed. The sentencing judge could select from a wide range of possible sentences to implement at his discretion.

In contrast, the second sentencing hearing was adversarial in nature. The prosecution was required to present new evidence. There were timely objections and disputed issues. After hearing all the evidence, the judge found "beyond a reasonable doubt" that the petitioner was a persistent offender.

Since jeopardy did not attach to the first sentencing proceeding, the second sentencing hearing did not violate the prohibition against double

jeopardy. Having found no constitutional violation, petitioner's ground d should be denied.

Petitioner's final two grounds for relief ((e) and (f)) allege that his right to effective assistance of counsel was denied when counsel failed to properly investigate and assert an alibi defense, failed to object to an improper demonstration and failed to object to a related closing argument.

A defendant is presumed to have received effective assistance of coun sel unless "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). Two elements must be satisfied before this claim may succeed. Counsel's performance must fall below an objective standard of reasonableness and the deficient performance must prejudice the defense. Id., at 687.

The proper measure to assess an attorney's performance is whether the effort put forth was reasonable under prevailing professional standards. Id., at 688. In this regard, petitioner must overcome a strong presumption that counsel rendered effective assistance. Id., at 690.

The Missouri Court of Appeals affirmed the trial court's decision that defense counsel rendered effective assistance. Bohlen, supra, 743 S.W.2d at 429. After careful review, the undersigned agrees and believes that counsel's efforts did not deny petitioner the right to a fair trial.

Petitioner first alleges counsel was ineffective for not thoroughly investigating an alibi defense. Petitioner claims he was present at the Maison de Bleu hair salon at the time of the robbery. (Exh. K. p. 5-6.) Petitioner alleges he gave counsel the names of two salon employees who could verify his alibi, Ricky Martin and Neal Cornell (now Cornell

Whitfield). (Exh. K, pp. 4, 33.)

The record shows counsel investigated each and every alibi defense petitioner offered. Counsel contacted the Maison de Bleu hair salon and spoke with an individual whose name he could not recall. (Exh. K, pp. 79-80.) That individual was unable to support petitioner's alibi defense and the investigation of the hair salon ceased. (Exh. K, p. 68.) Counsel contradicted petitioner's testimony and testified that the names of Cornell and Martin were never given to him. Thus, he could not contact them. (Exh. K, pp. 68, 81).

Petitioner next alleges counsel erred when he did not call Leslie Spivey to testify. Ms. Spivey pleaded guilty to participating in the jewelry store robbery and she received a ten-year sentence after a plea bargain. (Exh. K, p. 68). She had also been convicted of several other felonies. (Exh. K, p. 69.)

It is undisputed that counsel drove to

Jefferson City where Ms. Spivey was incarcerated to interview her. (Exh. K, p. 68). She indicated she may have some favorable testimony for petitioner. Id. Counsel believed evidence of the plea bargain and prior felonies would outweigh any aid her testimony could give. (Exh. K, pp. 68-69). Nevertheless, counsel subpoenaed her and she was present at trial in the unlikely event he decided to call her as a witness. (Exh. K, p. 69.)

Counsel made a strategic decision not to call Ms. Spivey to testify. Counselor's strategic decisions made after thorough investigation are virtually unchallengeable, and decisions following less thorough, but nevertheless reasonable, investigations are to be upheld to the extent they are supported by reasonable judgment. Strickland, supra, 466 U.S. at 690-691. Counsel's decision not to call Ms. Spivey to testify did not approach the unreasonableness which warrants habeas corpus relief.

Petitioner next alleges counsel improperly withdrew his initial objection to the prosecutor's improper demonstrative evidence. At trial the prosecutor offered into evidence a hat which was similar in size, shape and color to one of the hats worn during the robbery. (Tr. p. 179.) The prosecutor asked defense counsel to have petitioner try on the hat. Id. Defense counsel objected to the demonstration but subsequently withdrew the objection. Id. Petitioner complied and placed the hat on his head. (Tr. p. 180.)

It is unnecessary to determine whether failing to properly object to the demonstration amounted to error. Even assuming error occurred, petitioner cannot demonstrate he was prejudiced and did not receive a fair trial.

The second prong outlined in Strickland requires there be a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would be different. Strickland, supra, 466 U.S. at 694. A reasonable probability is one so strong that would cause a factfinder to pause and question the outcome. Id., at 494. Thus, an error by counsel cannot set aside a judgment if it had no effect upon it. Id., at 491.

There is little doubt the proceedings would have remained unchanged even if counsel did not allow the demonstration. The record reflects the weight of the evidence was against the petitioner. Two eyewitnesses (Robertson and Lang) independently identified petitioner as a participant in the robbery, both through photos and at trial. (Tr. pp. 159, 161, 178-179). Detectives found a jewelry tag from a ring taken at the Blust Jewelry Store at petitioner's home. (Tr. pp. 15-16.) Police officers also found a Colibri lighter which may have been taken during the robbery hidden between the seats of the squad car in which petitioner traveled. (Tr. pp.

223-224.) With all the evidence presented, it is highly doubtful the verdict would have been different had counsel not withdrawn his objection to the demonstration evidence.

Petitioner finally alleges that counsel's failure to object to the prosecutor's related closing arguments constituted error. The same reasoning stated above concerning grounds (a) and (b) applies here.

Petitioner's grounds (e) and (f) should be denied.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned United States Magistrate Judge that the petition of Christopher Bohlen for a writ of habeas corpus be denied without further proceedings.

The parties are advised that they have eleven (11) days in which they may file written objections to

this Report and Recommendation.

--David D. Noce--

UNITED STATES MAGISTRATE

Signed this --14th-- day of August, 1991.

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION SIX

STATE OF MISSOURI,	)No. 49064
	)
Plaintiff-Respondent,	)Appeal from the
	)Circuit Court of
	)St. Louis County
vs.	)Hon. Milton Saitz
	)Judge
CHRISTOPHER BOHLEN,	)OPINION FILED:
	)
Defendant-Appellant.	)August 20, 1985
	)
	)

In State v. Bohlen, 670 S.W.2d 119 (Mo.App. 1984) we affirmed defendant-appellant's conviction on three counts of robbery in the first degree. § 569.020 RSMo 1978. We rejected contentions of error relating to a sixth amendment claim on confrontation of witnesses and that a mistrial had been declared before the jury was permitted to deliberate the charges. There was, however, merit to a contention that the record failed to disclose a hearing and finding that defendant was a persistent

offender. The question of punishment was not submitted to the jury. Accordingly, we remanded for the sole and limited purpose of resentencing based upon evidence of prior convictions. State v. Holt, 660 S.W.2d 735, 739 (Mo.App. 1983). The question of double jeopardy was not involved because those provisions of the Fifth Amendment have been held not to apply to sentencing. State v. Lee, 660 S.W.2d 394, 399 (Mo.App. 1983).

In this appeal defendant claims the resentencing date after remand became the date of final judgment and Rule 30.01(a) authorizes a new appeal on the same contentions we considered in Bohlen I and an additional ground. Defendant now claims plain error occurred during voir dire when the state made an indirect reference to testimony, or the lack thereof, by defendant in derogation of his rights against self-incrimination protected by federal and

state constitution, statute and rule.[1] There was no objection before the trial court and this issue was not raised in the original appeal.

If we were to reach this new issue we would reject it. The question was improper but does not necessarily draw the attention of the prospective jurors to the defendant, his testimony or its absence. State v. Arnold, 628 S.W.2d 665, 669 (Mo. 1982). Within the standard of plain error concerning fundamental fairness, the question did not necessarily highlight or direct the attention of the venire panel to the fact that defendant may not or did

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[1]The question which defendant contends was offensive was:

> MR. BARRY: Do you understand that you, as jurors, cannot force any witness to testify? Is that clear to all of you? Nor can I, nor can his Honor Judge Saitz. Do you all understand that? We take what's given. We all take what's given. You can't force, I can't force anyone to testify. Is that clear to all of you?

not testify. The reference in the question to "any witness" did not necessarily refer to the defendant.

We do not reach this issue because all that remained in the case after remand in Bohlen I was the matter of resentencing if there was evidence from which the court could find defendant was a persistent offender.[2] Defendant cites no authority supporting his claim to a "reappeal" on matters already decided in the first appeal after a limited remand. We have found none. We apply the rule decided in civil cases that all points presented and decided in an appellate decision remain the law of the case in subsequent proceedings both in trial and appellate courts. Brooks v. Kunz, 637 S.W.2d 135, 138 (Mo.App. 1982). To do otherwise would have the effect of granting successive direct appeals in a

[2]If the state had not prove the alleged prior convictions, then a mistrial would have been in order because the jury did not determine punishment.

criminal case and that procedure has not been authorized by § 547.070 RSMo 1978.

The right to appeal in a criminal case is purely statutory. State ex rel. Garnholz v. LaDriere, 299 S.W.2d 512, 515 (Mo. banc 1957). It follows that any issue not presented in the first appeal and not related to the resentencing may not be considered in an attempted second appeal providing the first appeal followed a final judgment at the time of the appeal. The decision in Bohlen I followed a judgment and sentencing in a criminal case and was a final judgment for purposes of appeal. Accordingly, any issues not raised on direct appeal were waived; the issues presented were decided and are binding upon defendant.

This appeal does not involve any contention of error in regard to evidence supporting a finding that defendant was a persistent offender or the imposition of sentence.

We affirm the sentencing as authorized by law.

--KENT E. KAROHL--

KENT E. KAROHL, Judge

--Robert E. Crist-- --Concurs--

ROBERT E. CRIST,
Presiding Judge

--James A. Pudlowski-- --Concurs--

JAMES A. PUDLOWSKI,
Judge

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION THREE

STATE OF MISSOURI,	)	
	)	No. 46436
Plaintiff-Respondent,	)	Appeal from the Circuit Court of St. Louis County
vs.	)	
	)	Hon. Milton Saitz
CHRISTOPHER XAVIER BOHLEN,	)	Judge
	)	OPINION FILED:
Defendant-Appellant.	)	April 17, 1984

Defendant-appellant was found guilty by a jury of three counts, each charging robbery in the first degree, § 569.020, RSMo 1978. He was sentenced by the court as a persistent offender, § 558.016.2, RSMo 1978, to serve consecutive fifteen-year sentences on each count.

The state charged that the defendant, acting with others, on April 17, 1981, entered a jewelry store in St. Louis County, Missouri, and took curren-

cy and jewelry from the store, Count I, a wristwatch from the manager of the store, Count II, and a wristwatch from the female employee, Count III. The manager of the store, a female employee and two customers were forced at gunpoint to a back room and ordered to lie on the floor. Witnesses saw four black males and two black females run from the store.

Identification was the central issue. Two witnesses were able to identify the defendant as being one of the robbers. There was evidence connecting the defendant with a cigarette lighter of the type of some lighters taken in the robbery. The defendant called three witnesses all of whom were in the vicinity of the robbery at the time of the occurrence and all of whom were unable to identify him as one of the robbers.

Appellant challenges the convictions on three grounds. First, he contends that the court erred in

failing to dismiss Count III at the close of the state's case because the state failed to call the female employee whose wristwatch was taken in the robbery. Defendant maintains that he was thereby denied his constitutional right to confrontation and cross-examination guaranteed under the Sixth Amendment of the Federal Constitution and applicable in this state under the Fourteenth Amendment. Second, defendant contends that the Court lacked jurisdiction to complete the trial because the judge granted a motion for mistrial during the state's closing argument. In the alternative, defendant contends that the requested mistrial was required by timely objection to the prosecutor's prejudicial closing argument. Third, the defendant contends the punishment should have been imposed by a jury as the state failed to prove that he was a persistent offender.

Appellant's first point is without merit. The

Sixth Amendment guarantees a defendant in a criminal case the right "to be confronted with the witnesses against him" but it does not require the state to produce each and every witness who might present relevant testimony at trial. United States v. Polisi, 416 F.2d 573, 579 (2nd Cir. 1969). See State v. Smith, 632 S.W.2d 3, 5 (Mo.App. 1982). The constitutional guarantee of the Sixth Amendment is one of exclusion rather than mandatory inclusion. Invocation of the Sixth Amendment requires that evidence offered be excluded absent an opportunity by the defendant to test its credibility and probability by cross-examination. Ohio v. Roberts, 448 U.S. 56, 64 (1980). In this case, no such evidence was offered. The store manager testified that when threatened at gunpoint, he gave his wristwatch to one of the robbers and he helped remove the female employee's wristwatch and handed it to the same person. By this testimony alone the state made a

submissible case on Count III. It was not necessary to have the testimony of the owner of the wrist watch. Defendant's right to confrontation was not violated by her absence at trial. Turnbough v. Wyrick, 420 F.Supp. 588 (E.D.Mo. 1976) aff'd 551 F.2d 202 (8th Cir., 1977).

An understanding of the defendant's contention of error directed to his request for a mistrial requires additional facts. The store manager testified that a surveillance system camera was operating during the robbery and that after the robbery he gave the film to a police officer. The manager later viewed the film at a police station but the film was not offered in evidence.

In the opening portion of the state's closing argument the state argued "I believe the state has given you all the evidence you need to convict in this case." The defendant responded by arguing, "perhaps the most significant item in this whole case

is something that you haven't seen, something that I haven't seen, something that none of us will ever see ... Cameras are not like the human mind; they record exactly what they see." Thereafter, in the final portion of the state's closing argument the prosecutor told the jury, "The law obligates me, absolutely obligates me, to provide the defense with any information I have that will either condemn or exculpate the defendant." Defendant's objection that the state was arguing law and not evidence was properly sustained. State v. Holzwarth, 520 S.W.2d 17, 22 (Mo. banc 1975). Immediately thereafter, the prosecutor told the jury, "I assure you if I had a film that showed him, I'd show it to you. He knows that there was a film taken. He also knows that it didn't show a darn thing." The court sustained a general objection to that statement and the prosecutor thereafter immediately said, "There is no film."

Outside of the hearing of the jury the

defendant requested a mistrial and the court said, "I'll grant it." In an effort to save the proceeding the prosecutor explained that he thought that the court's rulings referred only to not arguing the law, offered an apology, and urged the court not to grant the mistrial. The prosecutor then suggested that "the jury be instructed to disregard what I have just argued, that you personally reprimand me for arguing before the jury. ... Reprimand me and instruct the jury that they must disregard what I have just said." Defense counsel suggested that if the judge was inclined to rule in favor of the prosecutor then "I would only re quest the court to make a statement that there was a film, to counteract the statement of counsel." Following a discussion off the record the court overruled the defendant's request for a mistrial. The court then announced to the jury, "Ladies and gentlemen of the jury, the court warns you to disregard the last statement of counsel." The court

neither reprimanded the prosecutor nor did he make a statement about the existence of the film.[1]

Appellant here contends that when the court sustained the motion for a mistrial jurisdiction to proceed was lost. This contention is simply not supported by the record. What occurred out of the hearing of the jury was an announcement by the court that he intended to grant a mistrial. After further argument he reversed his position. The initial statement was noth ing more than an indication of intention at a time when the declaration of a mistrial was within the discretion of the court. State v. O'Neal, 618 S.W.2d 31, 35 (Mo. 1981). The jury never heard the motion for a mistrial or the ruling. No announcement was made to the jury nor did the court announce a declaration of mistrial. In addition,

[1]There being no evidence that the film did not exist the court committed no error in not stating as a fact that it did not exist.

the defendant recognized the possibility that the proceeding would continue and requested alternative relief in the event a mistrial was not declared. The court granted the alternative request in so far as possible. No prejudice resulted. State v. Harry, 623 S.W.2d 577, 579 (Mo.App. 1981).

In the second part of his argument for a mistrial the defendant contends that a mistrial was required because of the prejudicial effect of the prosecutor's statements concerning the film and his obligation to present the film to the defendant. There was no evidence to support the prosecutor's statement that the film did not exist. The evidence indicated that the film was delivered to a police officer and later viewed by the store manager. Absent evidence which described the history of the film from the time it was seen by the manager until the date of the trial is not proper for the prosecutor to argue either the duty of the state to produce it or

what it may have disclosed. See State v. Moore, 428 S.W.2d 563, 565 (Mo. 1968).

The state's failure to justify non-production of the film once its' existence was established entitled the defendant to an inference that the contents of the film were unfavorable to the state's case. State v. Collins, 350 Mo. 291, 165 S.W.2d 647, 649 (1942). Defense counsel properly made that argument in his closing statement. The prosecutor's attempt to deny the defendant the benefit of the inference by asserting the film did not exist and that it did not show a darn thing was improper. Argument not supported in evidence or a misstatement of the evidence is generally regarded as error, especially if the statement of facts not in evidence is willful. State v. Swing, 391 S.W.2d 262, 265 (Mo. 1965). This type of conduct is particularly prejudicial where the prosecutor argued a matter immediately after the court sustained an objection in that regard. State v.

Ralls, 583 S.W.2d 289, 292 (Mo.App. 1979). In the case at bar the prosecutor continued to discuss the film after an objection and after an earlier statement by the judge, during the state's case, to bring in the film. In this case we find that any error was not prejudicial because the jury admonition to disregard the prosecutor's comment was adequate to cure the prejudicial effect. State v. Wren, 643 S.W.2d 800, 802 (Mo. 1983).

Defendant's third point of error concerns sentencing. Our search of the record indicates that although the defendant was sentenced by the judge as a persistent offender no proof was made of the prior convictions. We requested the parties to supplement the record to prove that the prior convictions were presented to the court. No such proof was furnished. We remand for a hearing on the allegations of the prior convictions. If the prior convictions are proved defendant should be resen-

tenced. State v. Holt, 660 S.W.2d 735, 739 (Mo.App. 1983). If the prior convictions are not proved the trial court judgment is reversed and defendant shall receive a new trial in order that a jury may consider all the issues.

Defendant's conviction is affirmed but the sentence is reversed and remanded for resentencing based upon the evidence of prior convictions.

--Kent E. Karohl--
KENT E. KAROHL,
Presiding Judge

JAMES R. REINHARD, Judge Concurs

WILLIAM H. CRANDALL, JR., Judge Concurs

IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Division #18 Hon. Thos. F. McGuire, Presiding
June 20, 1974

74-377
STATE OF MISSOURI)
)ON
)INFORMATION
v/s)FOR ILLEGAL
)POSSESSION
1974)OF SCHEDULE I
CHRISTOPHER BOHLEN)CONTROLLED
)SUBSTANCE
)HEROIN

Now, on this day, comes the Assistant Circuit Attorney for the State, and the defendant herein, in his own proper person, and in the presence of Daniel Reardon, Attorney and Counsel, in open Court; whereupon the Court orders the Official Court Reporter to take notes to preserve the evidence.

Whereupon, defendant is informed by the Court that he has heretofore entered a plea of guilty on April 29, 1974, to the crime of Illegal Possession

of Schedule I Controlled Substance Heroin and said plea having been accept ed by the Court upon the recommendation of the Assistant Circuit Attorney for the State and being now asked by the Court if he has any legal cause to show why judgment should not be pronounced against him according to law, and still failing to show such cause, it is therefor sentenced, ordered and adjudged by the Court that the said defendant, Christopher Bohlen, having pleaded guilty as aforesaid under Information against him be committed to the Department of Corrections of the State of Missouri, for the period of Two (2) Years, and that the judgment and sentence of this Court herein be complied with or until the said defendant shall be otherwise discharged by due course of law.

It is further ordered by the Court that jail time prior to conviction be allowed defendant in the above entitled cause.

Whereupon, the Court, having duly considered defendant's application for probation heretofore filed herein and being fully advised thereof and upon the recommendation of the Probation Officer, doth deny same.

It is further considered, ordered and adjudged by the Court that the State have and recover of said defendant the costs in this cause expended, and that hereof execution issue therefor.

THE PEOPLE OF THE STATE OF ILLINOIS,	) Indictments) 75-869 - Unlawful) delivery of Con-) trolled Substance.
VS.	) 76-459 - Violation) of controlled Sub-
CHRISTOPHER BOLEN, Defendant.	) stances Act) 76-460 - Violation) of Controlled Sub-) stances Act.

CHANGE OF PLEA TO GUILTY OF ALL THREE INDICTMENTS, PRE-SENTENCE INVESTIGATION

Now on this 6th day of March, 1978, come the People of the State of Illinois by Mr. Steve Rice, Assist. State's Attorney; comes also the defendant, Christopher Bolen, in person, in open court, and with his attorney, Mr. George Ripplinger, attorney at law;

And now the defendant comes and by and through his attorney informs the Court that he wishes to withdraw his prior pleas of not guilty to the charges as contained in the above indictments, and to now enter pleas of guilty to each of said indictments.

Whereupon, the Court advises the defendant of his constitutional rights, including his right to trial by jury, or by the Court without a jury, to confront witnesses who may testify against, as well as the possible consequences of his pleas of guilty under the old law and under the new law as of Feb. 1, 1978, and the defendant still persisting in his pleas of guilty to each indictment, the Court having heard and considered the factual basis of the states cases as to each indictment, accepts the defendant's pleas of

guilty to each indictment, and finds and adjudges the said defendant, Christopher Bolen, guilty of the crime of Unlawful Delivery of Controlled substance, as alleged in Indictment No. 75-869, and guilty of Violation of Controlled Substances Act, as alleged in Indictment 76-459, and guilty of Violation of Controlled Substances Act as alleged in Indictment 76-460, and the defendant's age to be 26 years.

The Court at this time orders a pre-sentence investigation and report to this Court on April 14, 1978, at nine a.m., in courtroom No. 9. The defendant is remanded to the custody of the Sheriff of St. Clair County pending further order of this Court.

--Patrick J. Fleming--

PATRICK J. FLEMING, Judge

W.J. Montgomery
Reporter

CC: Probation Department
Negot. Plea; in exchange for plea of guilty to each of the three indictments the State agrees to recommend the sentence of three years on each of three indictments, each to run concurrently, under new act.

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT OF ILLINOIS
ST. CLAIR COUNTY

THE PEOPLE OF THE STATE OF ILLINOIS,	))75-CF-869)No.76-CF-459)76-CF-460
VS.	))
CHRISTOPHER BOHLEN,	)Charge of Vio.
	)of Cent. Subs.
Defendant.	)Act

PRE-SENTENCE HEARING

Come the People of the State of Illinois by Mr. Rick Sturgeon, Assistant State's Attorney; comes also the defendant, in person, in open court, and with his attorney, Mr. George Ripplinger.

It appearing to the Court that on the 6th day of March, 1978, this defendant entered his pleas of guilty to the charges contained in three indictments, that pre-sentence investigation and report was ordered, and copies of same have been received by all parties, and that the case is now before the Court for disposition.

The Court now advises the defendant of his right to exercise an option to be sentenced under the old law or the new law, and the defendant elects with approval of his attorney to be sentenced under the new law.

ORDER AND JUDGMENT ON SENTENCE

The Court finds the age of said defendant to be 26 years.

The Court having considered evidence and statements in mitigation and aggravation of the offense, and now the defendant saying nothing further why the sentence of the Court should not be pronounced against him, the particular evidence, information, factors or other reasons why the Court is going to impose probation in this case are as follows:

After due consideration and deliberation the Court finds in AGGRAVATION the following: (1) The defendant has a history of prior delinquency or criminal activity; (2) The sentence is necessary to deter others from committing the same crime.

In addition the Court finds in MITIGATION the following: (1) The defendant's conduct neither caused nor threatened the serious physical harm; (2) Defendant did not contemplate that his criminal conduct would cause serious physical harm.

Whereupon, no reason appearing as to why sentence should not be pronounced, the Court sentences the defendant as follows: The defendant is remanded to the custody of the Department of Corrections for a term of three years. Judgment entered on the sentence. Court costs and State's Attorney's fees are hereby assessed against the defendant. Mittimus to issue. Defendant to be given credit for time served in the St. Clair County Jail relative to this offense.

Defendant is advised of his right to appeal.

--Patrick J. Fleming--

PATRICK J. FLEMING, Judge

4/14/78 S.Roe

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3360EMSL

Christopher X. Bohlen, Plaintiff-Appellant,	•	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
vs.	•	
Paul D. Caspari, et al., Defendants-Appellees.	•	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

December 8, 1992

Order Entered at the Discretion of
the Court:
--Michael E. Gans--
Clerk, U.S. Court of Appeals,
Eighth Circuit

PETITION UNDER 28 USC § 2254 FOR WRIT
OF HABEAS CORPUS BY A PERSON
IN STATE CUSTODY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Name: Christopher X. Bohlen
Prisoner No.: 45420
Case No.: 89-1651-C-4
Place of Confinement:
Missouri Eastern Correctional Center
18701 Old Highway 66
Pacific, MO 63069-9799
Name of Petitioner:
Christopher X. Bohlen
Name of Respondent:
Paul Caspari
The Attorney General of the State of:
Missouri - William Webster

PETITION

1. Name and location of court which entered the judgment of conviction under attack:
   Division 17 of the Circuit Court, 22nd Judicial Circuit, St. Louis County, MO; 7900 Carondelet, Clayton, MO 63105.

2. Date of judgment of conviction:
   October 15, 1982

3. Length of sentence:
   Three consecutive 15-year sentences aggregating 45 years.

4. Nature of offense involved (all counts):
Three counts of robbery first degree.

5. What was your plea?(Check one)
(a) Not guilty [X]
(b) Guilty [ ]
(c) Nolo contendere [ ]
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

---

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
(a) Jury [X]
(b) Judge only [ ]

7. Did you testify at trial?
Yes [ ] No [X]

8. Did you appeal from the judgment of conviction?
Yes [X] No [ ]

9. If you did appeal, answer the following:
(a) Name of court: Missouri Court of Appeals, Eastern District.
(b) Result: Conviction Affirmed.
(c) Date of result and citation, if known: April 17, 1984
(d) Grounds raised: (See attached).

The trial court erred, to the prejudice of Appellant, in going forward with the trial after declaring a mistrial in response to defense motion for the reason that the trial court was without jurisdiction to proceed with the same jury, and for the reason that the declaration of

mistrial was required by the improper and prejudicial conduct of the prosecuting attorney in closing argument in referring to matters outside the record in defiance of court rulings.

The trial court erred to the prejudice of Appellant in refusing to dismiss Count III of the information which charged a stealing from Minerva Paster, for the reason that Minerva Paster did not testify in the case, and there was no showing of unavailability, so that Appellant was deprived of his right to confront and cross examine the witnesses against him guaranteed by the Sixth Amendment of the United States Constitution, and was thus denied due process of law guaranteed by the Fourteenth Amendment.

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
(1) Name of court: Missouri Supreme Court.
(2) Result: Application of Transfer denied.
(3) Date of result and citation, if known: June 19, 1984.
(4) Grounds raised: (See attached).

The trial court erred, to the prejudice of Appellant, in going forward with the trial after declaring a mistrial in response to defense motion for the reason that the trial court was without jurisdiction to proceed with the same jury, and for the reason that the declaration of mistrial was required by the improper and prejudicial conduct of the prosecuting attorney in closing argument in referring to matters outside the record in defiance of court rulings.

The trial court erred to the prejudice of Appellant in refusing to dismiss Count III of

the information which charged a stealing from Minerva Paster, for the reason that Minerva Paster did not testify in the case, and there was no showing of unavailability, so that Appellant was deprived of his right to confront and cross examine the witnesses against him guaranteed by the Sixth Amendment of the United States Constitution, and was thus denied due process of law guaranteed by the Fourteenth Amendment.

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court: n/a
(2) Result: n/a
(3) Date of result and citation, if known: n/a
(4) Grounds raised: n/a

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes [X] No [ ]

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court: Division 17, 22nd Judicial Circuit;
(2) Nature of proceeding: Motion filed pursuant to Missouri Supreme Court Rule 27.26 (repealed);
(3) Grounds raised: See attached sheet.

A. Petitioner was denied due process of law and effective assistance of counsel when agents of the State negligently and/or intentionally lost or destroyed material evidence that could have established his innocence or negated his guilt;
B. The Defendant was subjected to double jeopardy in violation of the Fifth Amendment to the United States Constitution when the court allowed the State to present evidence at two separate enhancement proceedings when it was determined that the evidence presented at the original enhancement proceeding was deficient. The result being that the Defendant's sentence was enhanced and the sentence of 45 years was imposed;
C. The assessment of a $26.00 judgment against Movant violated the Ex Post Facto clause to the State and Federal Constitution.

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [X] No [ ]
(5) Result: Motion was denied.
(6) Date of result: September 15, 1986.

(b) As to any second petition, application or motion give the same information:
(1) Name of court: n/a
(2) Nature of proceeding: n/a

(3) Grounds raised: n/a
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes [ ] No [ ] n/a
(5) Result: n/a
(6) Date of result: n/a

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc.:
Yes [X] No [ ]

(2) Second petition, etc."
Yes [ ] No [X]

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: In order to proceed in federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction)

on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grant or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: See separate sheet.

A. Defendant's conviction was obtained by a violation of his privilege against self incrimination in that the prosecuting attorney was allowed during voir dire examination to inform the jury that neither they nor he nor the court could force any witness to testify. The prosecutor thus intentionally directly commented on Defendant's right to refrain from testifying and violated Petitioner's privilege against self incrimination as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution.

Supporting FACTS (state briefly without citing cases or law):

Supporting Facts: Voir Dire transcript, Page 22 - Mr. Barry (Assistant Prosecuting Attorney): "Do you all understand that you, as jurors, cannot force anyone to testify. Nor can I, nor can his honor, Judge Sitz. Do you understand that? We take what is given. We all take what is given. You can't force, I can't force anyone to testify. Is that clear to all of you?" (See Exhibit 1).

B. Ground two: Separate sheet.

B. Defendant was deprived of due process of law when the trial court, after declaring a mistrial, proceeded without jurisdiction with the same jury and, as a direct result of the improper and prejudicial conduct of the prosecuting attorney in closing argument, a conviction was obtained. The argument of the prosecuting attorney referred to matters outside the record and was in defiance of earlier

court rulings and violated movant's right to a fair trial as guaranteed him by the Fifth and Fourteenth Amendments to the United States Constitution.

Supporting FACTS (state briefly without citing cases or law):

Supporting Facts: Transcript, 326-328.
Mr. Barry: "If I had a film that showed him, I would show it to you. He knows that there was film taken. He also knows that it didn't show a darn thing."

Mr. Leads: "Judge, I am going to object. I ask that statement be stricken."

The Court: "I will sustain the objection. The last statement --"

Mr. Barry: "Counsel argue this. I believe I am --"

The Court: "Just a minute, Mr. Barry. I ruled on the objection. Let's continue."

Mr. Barry: "There is no film."

Mr. Leads: "Judge, I am going to object."

The Court: "Step to side board, please, you too, Mr. Barry."

<u>PROCEEDINGS OUTSIDE HEARING OF THE JURY</u>

The Court: "I cautioned you --"

Mr. Barry: "Yes, your honor."

The Court: "Do you have any other requests at this time?"

Mr. Leads: "I would, for the record, I would request a mistrial."

The Court: "I'll grant it."

• • •

(OFF THE RECORD DISCUSSION)

The Court: Back on the record. The Court, after consideration, overrules the Defendant's request for a mistrial and the jury will be instructed to disregard the last statement of counsel. (See Exhibit 2).

C. Ground three: See separate sheets.

The Defendant was denied due process of law when the trial court failed to declare a mistrial when the prosecuting attorney improperly and prejudicially argued facts and matters not before the jury in evidence which he knew to be improper. The prosecuting attorney argued that there was no film and that if the film had showed him innocent he would have brought it to show to the jury when in fact he had earlier declared to the court that the film had been destroyed. This deceptive and improper argument violated movant's right to a fair trial as guaranteed him by the Fifth and Fourteenth Amendments to

the United States Constitution.

Supporting FACTS (state briefly without citing cases or law): See separate sheet.

Supporting Facts: See Point 2 (transcript p. 134-136) (See Exhibit 3).

D. Ground four. See separate sheet.

Defendant was denied his right to confront and cross examine witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution and due process of law as guaranteed him by the Fourteenth Amendment to the United States Constitution when the court refused to dismiss Count III of the information - stealing from Minerva Paster - for the reason that the victim did not testify in the case and there was no showing of unavailability.

Supporting FACTS (state briefly without citing cases or law):

Supporting Facts: Trial transcript p. 285-287. (See Exhibit 4).

E. Petitioner was denied due process of law and a fair trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution because agents of the State destroyed material evidence thus depriving Defendant of the use of the material which could have established his innocence or negated his guilt.

Supporting Facts:

The robbery was filmed by a camera located on the premises. According to the prosecuting attorney, the film was destroyed. (Tr. 136) It is Petitioner's contention that the film would have demonstrated that he was not in the store on the date in question and did not participate in the robbery as alleged in the information. The impact resulting from the destruction of this evidence is aggravated by the prosecutor's insistence, without factual foundation, that the film was insignificant. See Point 12 (B) and (C), supra. (See Exhibit 5)

F. Petitioner was subjected to double jeopardy in violation of the Fifth Amendment to the United States Constitution when the state was allowed to adduce additional evidence at a second enhancement proceeding to meet its burden of proof under the terms of the Missouri persistent defender statute (558.016 RSMo. 1982).

Supporting Facts:

The State failed to offer any proof to establish his prior of convictions necessary to enhance his sentence at either his original sentencing proceeding, or when requested by the Court of Appeals, State v. Bohlen, 670 S.W. 2d 119, 123 (1984). The cause was remanded to the trial court and the State was improperly allowed a second bite of the apple and apparently mustered sufficient evidence to satisfy Missouri's statutory sentencing requirement. § 558.016.2, RSMo 1978.

G. Petitioner was denied effective assistance of counsel when trial counsel failed to pursue the Motion for a Mistrial during the closing argument of the State when the court indicated that it would grant said motion. Nor did defense counsel request the court to admonish the prosecuting attorney in the presence of the jury although the court indicated at one point in time their willingness to do so. The argument in question was highly prejudicial and counsel's failure to persist in his request for mistrial that had already been granted was without strategical purpose.

Supporting Facts:

See Point 1.

H. Defendant was denied effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution in that his trial attorney was incompetent for failing to assert the defense of alibi and for failing to interview alibi witnesses Ricky Martin, Cornell Whitfield and Lisel Spivey.

Supporting Facts:

According to the Appellate Court in Bohlen v. State, 743 S.W.2d 425 (Mo. App. 1987), Movant testified in his 27.26 hearing that he gave his trial counsel the names of two alibi witnesses, Ricky Martin and Cornell Whitfield. Id., at 427. Martin and Whitfield testified in the 27.26 hearing. Id. According to the

Appellate Court, Martin testified that Movant was at the Maison De Bleu Hari Salon from around 11:00 a.m. until 2:00 or 3:00 p.m. on April 17, 1981. Id. Whitfield testified that he arrived at the Salon around 12:30 and Movant was already there and remained until 2:00 or 3:00 p.m. Id. Movant's trial attorney testified, according to the Appellate Court, that Movant advised him of several possible alibis, among them his employer, girlfriend, an unidentified female, and the hair styling salon. Id. According to trial counsel, he investigated the employer, the girlfriend, and the woman. Id. Counsel stated that he phoned the hair salon and spoke to someone there. Id. Counsel did not know who he spoke to but did know that he did not talk to Martin or Whitfield, since he had spoken to a woman. Id.

Lisel Spivey was subpoenaed by counsel and brought to court but was not called to testify. Id., at 428. Spivey, who pleaded guilty to the jewelry store robbery, would have testified that Movant did not participate in the robbery.

I. The prosecuting attorney violated Defendant's right to due process and equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution, when the prosecutor used seven of his preemptory strikes to strike all the black members from the jury panel.

Supporting Facts:

Movant asserts that the prosecutor used

seven preemptory strikes to remove all black members of the jury panel in order to obtain an all white jury. Movant is black, and therefore, the prosecutor's actions deprived him of a fundamentally fair trial before a jury of his peers.

J. Defendant was denied due process of law and effective assistance of counsel guaranteed by the Fifth, Sixth and Fourteenth Amend ments to the United States Constitution when trial counsel failed to object to the admission of evidence which was not shown to have any connection to the defendant, but which may have been found to be related to the crime, where the jury could have mistakenly inferred a relationship between the defendant and the evidence, thus creating an improper basis for a finding of guilt.

Supporting Facts:

State's Exhibits 4, 5, and 6, a cap, a ski-mask, and a trash bag, were introduced by the State and repeatedly exhibited to the jury during the questioning of the State's witnesses without objection or request for qualification by defense counsel. [Transcript 31, 79-80, 82, 92-94, 106, 117, 118, 120, 141, 147, 158, 179]. These items seized from the home of Major Bogan who was never alleged or shown to have any connection with the defendant. [Transcript 92-93]. The State implied a connection between the Exhibits and the robbers and a connection between the defendant and the Exhibits. Because trial counsel failed to object to the admission or

request qualification about the use of the Exhibits as evidence against the defendant, the jury was erroneously allowed to connect the defendant to the Exhibits and thus to the robbery. (See Exhibit 6).

K. Defendant was denied due process of law, effective assistance of counsel, and his right to be free from compelled self-incrimination as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution when trial counsel allowed the defendant to be compelled to place a cap, State's Exhibit 4, on his head in front of the jury while the prosecuting attorney questioned a witness about the perpetrator of the crime who was alleged to have worn a similar cap. [Transcript 179-80]. This demonstration by the prosecuting attorney unnecessarily forced the defendant to create the impression for the witness and the jury that the defendant not only resembled, but was, the perpetrator.

Supporting Facts:

During the testimony of State's witness Mark Lang, [Transcript 174-181] the prosecuting attorney requested defense counsel to instruct the defendant to place a cap State's Exhibit 4 on his head for observation by the witness and the jury. After initially stating an objection, trial counsel, without waiting for a ruling from the judge, withdrew his objection and ordered the defendant to comply. [Transcript 179]. The prosecutor ordered the defendant to press the hat down on his head

so that defendant's hair would stick out from the bottom of the cap in a manner consistent with the testimony of witnesses to the crime in order to create the look which the prosecutor sought to convey to the witness and the jury. [Transcript 179-80]. The prosecutor then asked, "Is that the shape of the hat you saw on this man's head that day?" [Transcript 180]. "The shape of the hat" could have been established without allowing the defendant to be forced to display his hatted self to the witness and the jury. (See Exhibit 6, p. 179-80).

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes [ ] No [X]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing:
Kenneth Leeds

(b) At arraignment and plea:
Kenneth Leeds

(c) At trial:
Kenneth Leeds

(d) At sentencing:
Kenneth Leeds, Frank Anzalone, 111 S. Bemiston, Suite 211, Clayton, MO

63105.

(e) On appeal:
Toby Hollander

(f) In any post-conviction proceeding:
Toby Hollander

(g) On appeal from any adverse ruling in a post-conviction proceeding:
n/a

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes [X] No [ ]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes [ ] No [X]

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [ ] No [ ]

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

-RICHARD H. SINDEL-
Richard H. Sindel
8008 Carondelet, Suite 301
Clayton, MO 63105
(314) 721-6040

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 8, 1989.

(date)

--CHRISTOPHER X. BOHLEN--
Signature of Petitioner